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VINCENT SEAVER, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS McGEE, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

A Decision in Petitioner's Favor Would Not Encourage Registrants to Avoid the Administrative System.

Petitioner argued in his Brief (pp. 36-38) that the exhaustion requirement was not justified by any reasonable apprehension that if the requirement were to be relaxed in this case, other registrants would be encouraged to avoid administrative remedies available to them. The government responds by suggesting that a decision for petitioner would in fact seriously interfere with the operations of

the Selective Service System by encouraging registrants, with the "expert" assistance of draft counselors, to submit a "carefully drawn" SSS Form 150, forego a personal appearance and appeals and ". . . take a chance on asserting the defense of misclassification in criminal prosecutions, with resulting delay." (Brief for the United States, p. 30.) That position wholly misconceives petitioner's argument as well as the operation of local boards in conscientious objector cases.

The government's position assumes the ease of drawing a Form 150 which will establish a *prima facie* case, an assumption belied by the number of cases in which registrants have been unable to establish a *prima facie* case. See, e.g., *United States* v. *Brown,* 423 F.2d 751 (3rd Cir. 1970); *Keefer* v. *United States,* 313 F.2d 773 (9th Cir. 1963); *United States* v. *Wallace,* 310 F. Supp. 961 (E.D. Cal. 1970); *United States* v. *Warner,* 284 F. Supp. 366 (D. Ariz. 1968); *United States* v. *Wider,* 119 F. Supp. 676 (E.D.N.Y. 1954). "A prima facie case of the registrant's sincerity is not made merely by a statement of his beliefs without more. . . ." *Salamy* v. *United States,* 379 F.2d 838, 842 (10th Cir. 1967).

The government is led to this error by ignoring the fact that local boards have before them not only "well-drawn" forms, but an applicant's entire file, which may well reflect activities or beliefs during his life which are inconsistent with entitlement to conscientious objector status. As this Court has noted a registrant may fail to make out a *prima facie* case where

> ". . . the claim is plainly incredible, or where, even if true, it would not warrant reclassification, or where the claim has already been passed on, or where the

claim itself is conclusively refuted by other information in the applicant's file. Moreover, a registrant who makes false statements to his draft board is subject to severe criminal penalties. 50 U.S.C., App. §462(a)." *Mulloy* v. *United States,* 398 U.S. 410, 418, n. 7 (1970).

But assuming the registrant avoids these obstacles and in fact presents a *prima facie* case, where then is he? He may of course get the exemption, a result the likelihood of which would be neither increased nor decreased by a decision for petitioner. If he is classified I-A, however, according to the government there would be nothing which a reviewing court could later find as a basis in fact for denying the exemption. But how, then, could the board have classified him I-A? If, as the government apparently suggests, it is because the applicant has not demonstrated his sincerity by a personal appearance, we point out that the registrant up to this stage has no right to appear before the board and it is the regulations themselves which give the right to appear only *after* the classification and not before. 32 C.F.R. 1624.1(a). In any case, if the board feels that the "well-drawn" Form 150 demonstrates that the registrant is insincere in his claim so as to justify a I-A classification, it should—and must—be able to point to some "affirmative evidence," *Dickinson* v. *United States,* 346 U.S. 389, 396 (1953), supporting its position. The board can then record those facts in the registrant's file for a reviewing court to see. But the local board is not permitted to reject a claim simply on the basis of some vague doubts about the registrant's sincerity. As this Court noted in reversing the conviction in *Dickinson, supra*:

"The court below in affirming the conviction apparently thought the local board was free to disbelieve Dickin-

> son's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence. . . . Dickinson's claims were not disputed by any evidence presented to the selective service authorities, nor was any cited by the Court of Appeals. The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities." *Id.* at 396.

On the other hand, the local board is not powerless when it has vague doubts but no "affirmative evidence" to which it could point. The Selective Service regulations give the board wide powers to obtain that evidence, 32 C.F.R. 1621.14, 1621.15 and 1625.1(c), powers to which this Court referred in *Dickinson*. *Id.* at 396-97. The court below recognized that the board possessed the power to compel petitioner to appear if it doubted his sincerity (A. 71). In fact, New York City boards, such as petitioner's, have available a form (Addendum to this Reply Brief, p. 11) for just those instances where a board needs the registrant's appearance in order to properly classify him.

If the board requires the registrant's appearance before it, and he refuses for reasons not consistent with conscientious objection, the board might well take that to evidence a lack of sincerity and conclude that he has not satisfied the burden of proving his entitlement to the exemption. "In conscientious objector cases, therefore, any fact which casts doubt on the veracity of the registrant is relevant. It is 'affirmative evidence . . . that a registrant has not painted a complete or accurate picture. . . .'

Dickinson v. United States, supra, 346 U.S. at 396." *Witmer* v. *United States,* 348 U.S. 375, 381 (1955).

Nothing in our Brief suggests that relaxing the exhaustion doctrine would relieve the registrant of this burden. *Dickinson* v. *United States, supra.* To the contrary, we concede that he must present his claim to the local board (Brief for Petitioner, p. 33, n. 9). If that claim is inadequate to justify conscientious objector status, the board should state its reasons and a reviewing court will have a basis in fact to support the board's action.[1]

The government's confusion here is a result of its continued insistence that petitioner made out only a *prima facie* case (Brief for the United States, pp. 5, n. 3, 26, 27, 29, 30, 31). In reality, all three judges in the court below agreed that the local board had no basis in fact for denying petitioner's conscientious claim (A. 71-72, 79). And the majority did not merely confine its review to his Form 150 as the government implies (Brief, p. 26, n. 16), but considered as well, "his prior [and] his subsequent actions" (A. 71) along with the rest of his file, which is all that petitioner's board customarily had before it in conscientious objector cases. *Ibid.* In short, we do not argue that a registrant need not supply all that information which the board requires in order to grant him his classification, nor do we dispute that the burden of proving that he deserves the classification is on him. If, however, a regis-

[1] The requirement that boards state reasons for their actions is now law in many circuits. See, *e.g., United States* v. *Deere,* 428 F.2d 1119 (2d Cir. 1970); *Scott* v. *Commanding Officer,* 431 F.2d 1132 (3rd Cir. 1970); *United States* v. *Broyles,* 423 F.2d 1299 (4th Cir. 1970); *United States ex rel. Brown* v. *Resor,* 429 F.2d 96 (10th Cir. 1970); *United States* v. *Lemmens,* 430 F.2d 619 (7th Cir. 1970).

trant, such as petitioner, meets that burden, he need not appeal from the board's denial of his classification in order to challenge that action in defense to a criminal proceeding.

Having clarified our position, we return to the tactic of delay raised by the government and discussed in the opening paragraph of this Brief. Since we have suggested no less of a burden upon the registrant in proving his case, whether or not he exhausts his remedies, the "expert" draft counselor will offer the same advice as he now does regarding personal appearances. That advice is invariably to appear since that still remains the best opportunity to convince the board of the sincerity of one's claim. CCCO, *Handbook for Conscientious Objectors* 20 (1970); Blackman, *Face to Face With Your Draft Board* 11-12 (1969); SSLR Practice Manual ¶1079 at 1064 (1968).

II.

Petitioner's Failure to Report for a Physical Examination Was Not Unlawful.

Petitioner in his Brief (pp. 52-54) argued that his failure to report as ordered for a pre-induction physical examination would have been excused had he been properly classified. The government takes issue with this argument by relying on the dictum in *McKart* v. *United States,* 395 U.S. 185, 203 (1969), that "[a]n invalid classification . . . would not be a defense today to a prosecution for failing to report for a pre-induction examination." The inapplicability of this language to the instant case was demonstrated by Judge Feinberg in his dissent below.

"... *McKart* did not deal with the wrongful denial of a I-O classification, and thus did not consider the option to waive a physical examination which is afforded to registrants holding such a classification. McGee should not be penalized because of the board's error, or deprived of the benefit of selective service procedures designed for conscientious objectors. Therefore, McGee's conviction on Count 2 should also be set aside" (A. 87-88).

Judge Feinberg's reasoning was anticipated by the court in *United States* v. *Walsh*, 279 F. Supp. 115 (D. Mass. 1968), where the defendant was prosecuted for failure to submit to induction and for failure to report for a pre-induction physical examination. In granting the defendant's motion for acquittal on the physical examination count, the court stated:

> "Had the board classified him I-O, defendant's delinquency status would have been rendered moot, since I-O registrants who fail to report for physical examinations when ordered are not classified as delinquents .... Because this possibility was denied defendant by reason of the board's arbitrary action, his motion for judgment of acquittal is granted as to Count I as well." 279 F. Supp. at 121.

This position has been adopted by the Ninth Circuit in *United States* v. *Brandt*, No. 25,486 (9th Cir., Dec. 4, 1970). There the court reversed the defendant's conviction for failure to report for a physical examination on the ground that the underlying I-A classification, as petitioner argues here, was invalid. The government's attempt to

distinguish *Brandt* (Brief for the United States, p. 40, n. 27) as a case involving a question of law, while maintaining that the issue here is one of fact, is without merit. Petitioner's local board, in denying his conscientious objector application without a basis in fact (A. 71-72, 79), acted outside of its jurisdiction just as did the local board in *Brandt*. *Estep* v. *United States*, 327 U.S. 114, 122 (1946).

The government argues that ". . . allowing registrants to ignore such orders [for example, to report for a physical examination] would plainly disrupt the reasonably efficient functioning of the system, in which there is a strong public interest." (Brief for the United States, p. 40.)

However, the Selective Service regulations make provision for the smooth functioning of the system when a registrant fails to report for a pre-induction physical examination. Such a registrant may be declared a delinquent, 32 C.F.R. 1642.4(a), and ". . . may be ordered to report for induction without being given an armed forces physical examination." 32 C.F.R. 1628.10.

The petitioner here admittedly failed to report as ordered for his pre-induction physical examination. His local board then proceeded to classify him I-A delinquent (A. 58, 64). But the government's argument that refusal to report for a pre-induction physical ". . . would plainly disrupt the efficient functioning of the system . . ." ignores the fact that petitioner, in accordance with Selective Service procedure, was ordered to report for induction without having first undergone a pre-induction physical examination.

Moreover, the petitioner's failure to report for the pre-induction physical examination did not prejudice the Selective Service System since he took and passed a complete physical examination the day he refused induction. That

Selective Service was not prejudiced by petitioner's failure is demonstrated by its decision not to prosecute petitioner immediately after he failed to report for the physical examination.[2]

Instead, petitioner's local board proceeded in accordance with Local Board Memorandum No. 14, para. 3(c), by declaring him delinquent. Apparently, Selective Service believed this procedure to thoroughly vindicate its interests here since the Director of New York Selective Service recommended prosecution only for refusal of induction and nonpossession of a draft card (Govt. Ex. 39, A. 58-59).[3]

The position of Selective Service is understandable in view of the fact that, pursuant to AR 601-270, para. 32a, petitioner received a complete physical examination when he appeared at the induction station on the day scheduled for induction. As a result, the induction station personnel had all the information they needed to determine his acceptability—and all the information which they would have obtained had petitioner taken the pre-induction physical (Govt. Ex. 37).

If, under these circumstances, Selective Service, charged with administering the Act, believes that a registrant has substantially performed the duties required of him, we submit that petitioner has committed no crime.

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[2] It is noteworthy that the defendant in *McKart* also was ordered to report for a pre-induction physical, but failed to do so, and was declared a delinquent. 395 U.S. at 188. McKart then failed to report for and submit to induction and was subsequently prosecuted for this alleged violation of the Act, but he was not prosecuted for his failure to report for the pre-induction physical examination.

[3] This recommendation was made in accordance with the policy of the Selective Service System. See Brief for Petitioner, p. 49, n. 17.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, the Court should reverse the judgment below and enter a judgment of acquittal on all four counts of the indictment.

Respectfully submitted,

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ADDENDUM

ADDENDUM

DATE:

SS No.

Dear Mr.

An appointment has been scheduled for you to appear at this Local Board office on 19 at P.M. for the reason checked below:

☐ Your request for a personal appearance. If you have any new evidence pertinent to your case, please put it in writing and send it to the Local Board prior to the date of your appearance or bring it with you. This will give the board time to consider this new evidence so that they may discuss it with you at the time of your appearance and that the evidence may be included in your file.

☐ You are to appear for a permissive interview. Any evidence you wish the Local Board to consider is to be submitted in writing prior to or on the date of your interview, and will be included in your file.

☐ You are to see the Government Appeal Agent as you requested, so that he may assist you in your appeal or advise you concerning present Selective Service Laws, Regulations and directives. Any evidence submitted should be in writing.

The Local Board may impose a limitation on the time you may have for your appearance. You should plan your presentation beforehand, making it as brief and concise as possible. The Local Board may permit any other person to appear before it with you, or on your behalf; however, they may not permit you to be represented by an attorney or legal counsel.

.....

SSS-NYC
Form No. 44
(Revised Aug 4, '70)